IN THE

Supreme Court of the United States

October 1948 Term

No. 457

457

WILLIAM H. HIATT, United States Penitentiary, Lewisburg, Pennsylvania,

Petitioner,

—*v.*—

BERNARD W. SMITH,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI.

DANIEL F. MATHEWS,
Attorney for Respondent,
Office & P. O. Address,
913-919 University Building,
Syracuse, New York.

F. N. SPAULDING L. W. PRINTING CO., SYRACUSE, N. Y.

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Statement.

The defendant, Bernard Smith, a U. S. soldier stationed in England, was charged with a violation of A. W. 92, the rape of Sheila Dale, and A. W. 93, "with intent to commit a felony, viz., rape committed an assault on Miriam Florence Cullum on Tuesday, July 11, 1944, at approximately 11 o'clock in the evening of said day."

The offenses were alleged to have been committed between 10:40 P. M. Tuesday, July 11, 1944, in the Cullum case, and in the Sheila Dale case, between 11:30 and 11:45 P. M. of that day. Each offense took place in the same neighborhood, about five miles away from camp. The terrain was very hilly and upgrade from the scene of the offense to the camp. Complaint was made to Constable Felton in the Cullum case six days later on July 17th, when he called at her home. Complaint was made in the Dale case the next day, about 10 A. M., July 12th, when Dr. Beckett summoned the police, stating that the Dale girl consulted him complaining that she had been raped, that no contrageptive was used and she was worried lest she be pregnant. Neither girl nor their families called the police. On July 18th, about 11 A. M. Constable Felton, a British police officer, called at the Raydon Aerodrome, and consulted with 1st. Todd, Provost Marshall, concerning the incident. He gave a description of the assailant of the girls and thereupon Todd sent for a number of men who might be suspect. After nine men had been interviewed the defendant was summoned. The Cullum girl claimed that when assaulted she bit her assailant's *right hand* near the thumb. No description of the bite was given. No mention was made as to whether blood was drawn or whether the bite caused a laceration. On interviewing the defendant in the presence of American officers, including Provost Marshall Todd who conducted the examination, under A. W. 24, Constable Felton grabbed the defendant's hands and thereupon found a laceration of the *left* hand. The defendant stated that he had cut his hand with a cleaver opening cans of milk. Sgt. Pelletier, his superior, corroborated this explanation. The defendant was then confined to the guard house by Todd. At 7:15 P. M. on July 18th, a lineup was arranged by Todd wherein the defendant was identified by

both girls. The defendant claims the lineup was conducted in a fraudulent manner. Constable Felton provided Todd prior to the lineup with a statement signed by the Dale girl dated July 12, 1944, and a statement of the Cullum girl was taken at 7 o'clock on July 17, 1944. Each girl supplemented her statement at the Raydon Aerodrome immediately after the lineup. Todd testified the lineup was conducted about a week after he was appointed investigating officer. All government witnesses testified the lineup took place within 4 hours after Todd first heard of the case and prior to July 19, 1944, the date of the charges. The Government now admits Todd erred re the date. Charges were signed by Capt. Ernest P. MacGregor. The impartial investigator pursuant to the Manual for Courts Martial could not legally be appointed prior to the signing of the charges. Todd knew of and testified to this. Todd conducted the lineup and took the statement as Provost Marshall, then reported same to his superior officer, having placed Smith under arrest at 4 P. M. that afternoon. The superior officer appointed Todd as impartial investigator to determine the accuracy of the charges that Todd himself instigated. The actual appointment of Todd or the date of his appointment was claimed to be missing from the Government record. Attorney for the defendant found same in the record on the date the appeal was argued, April 8, 1948. Subsequent to his appointment as impartial investigator under A. W. 70 he again talked to the complainants, Dale and Cullum, and interviewed nine witnesses at the request of the defendant.

Todd made no investigation as to the reputation of either complainant as to chastity or virtue, and he did not interrogate one Mrs. Kerry, the only disinterested witness re identify, who was with the complainant Cullum and the

assailant and walked some distance with them immediately prior to the alleged assault. Todd stated that she was not a necessary witness in that the defendant didn't request her testimony and the Government did not need her testimony. Smith testified at the hearing that Todd advised him not to have Mrs. Kerry called as a witness. Neither girl had any information concerning the assault on the other girl prior to the meeting, so that the conviction in each case rested on the uncorroborated and unsupported testimony of each complainant. The defendant produced a witness who lived in the locality who testified that the Dale girl had a bad reputation for chastity. She was not allowed to testify concerning the reputation of the Cullum girl. The physician called by Dale said he would not say a rape had occurred.

No physician was called by the Government to examine the defendant and ascertain whether the laceration on the defendant's hand was caused by a bite or a cleaver. A bite would cause two lacerations from the upper and lower teeth. There is evidence of only one laceration such as could come from a cleaver.

The defendant was represented on the trial by an air corps officer who was not a lawyer, although two men whom the Government claimed were lawyers sat in the trial as counsel. Neither participated in the trial. The Government was represented by two members of the Judge Advocate General's office, who were attorneys.

Six soldiers, including the sentry on the gate, testified the defendant was in camp at the time of the assault. The time of the assault, to wit: 11 to 11:45 P. M., fixed by Dale, was further corroborated by the fact that she couldn't ride her bicycle in that it had no lights and it was getting pretty

dark (R. 250). The U. S. Nautical Almanac verifies this statement. English war time was two hours faster than standard time.

On the trial Lt. Todd acted as Asst. Trial Judge Advocate.

The defendant was found guilty and sentenced to life imprisonment, which has been reduced to 12 years. He is now incarcerated in Lewisburg Penitentiary.

A rule permitting a habeas corpus was filed by Honorable Frederick Follmer, U. S. District Judge. After a hearing the application for habeas corpus was denied. The Government included in the record before Judge Follmer C. I. D. reports which was not part of the trial and which the attorney for the petitioner was not permitted to see at the time on the ground they were confidential communications. Judge Follmer quoted from the C. I. D. reports in his opinion.

The defendant requested the Circuit Court to decide the case on the merits and did not ask for a technical reversal. The defendant calls the attention of the Court to the fact that the C. I. D. report is not a proper part of the case and is contained at Page 79 to 82 of the record. This report was not before the court martial.

The District Court wrote an opinion denying the habeas corpus on August 7, 1947, from which decision the defendant appealed to the Court of Appeals for the Third Circuit. The case was argued April 8, 1948, and decided September 14, 1948, which decision reversed the District Court and directed the defendant be released from custody forthwith.

From that decision the Government prays for a writ of certiorari to this Court.

POINT I.

The impartial and thorough investigation under A. W. 70 is jurisdictional.

The courts have universally held or conceded that the thorough and impartial investigation is a jurisdictional requirement.

(*Hicks v. Hiatt*, 64 F. Sup. 238;

Anthony v. Hunter, 71 F. Sup. 823;

Benjamin v. Hunter, 162 F. 2d 512;

Henry v. Hodges, 76 F. Sup. 968, reversed in that there was substantial compliance of A. W. 70;

University of Chicago Law Review No. 13 at 494;

Illinois Law Review No. 41 at 260;

Waite v. Overlade, 164 F. 2d 722, certiorari denied 334 U. S. 412;

De War v. Hunter, ... F. 2d ..., decided 12-3-48;

Redlen v. Pescor, 156 F. 2d 632.)

The Board of Review held as follows in 1924:

"... However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraphs 76a, Manual for Courts-Martial, 1921, relating

to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void ab initio (CM 161728, Clarke). Subsequent holdings of the Board of Review have reached the same result (CM 182225, Keller; CM 183183, Claybaugh). In neither of these latter cases was the holding based upon lack of jurisdiction; rather the theory appears to have been that failure to comply with Article of War 70 was per se an error injuriously affecting the substantial rights of the accused." (CM 299477 (Floyd 17 Br 149, 153 156 (decided February 2, 1943.)

There is no decision cited anywhere by the Government indicating that substantial compliance with A. W. 70 is not a jurisdictional necessity.

The Board of Review reports cited by the Government are not available to defendant. The defendant is advised that the decision in the *Floyd* case, supra, wherein the Board of Review stated that A. W. 70 was not jurisdictional, cited by the Government was in fact dicta. Under the Federal Constitution all persons are entitled to due process of law. A citizen in the United States Army is subject to court martial law in lieu of the civilian law. The law under the Articles of War is intended to give the defendant substantial justice, although same is somewhat streamlined. In that many of the protections afforded a civilian citizen are denied a soldier, the few safeguards given a soldier must be therefore more rigidly adhered to and respected. Comparing the rights of a soldier and citizen, the following chart as to relatives rights is submitted:

	Citizen	Soldier
1. Entitled to counsel at all stages of the proceeding	Yes	No
2. Prompt arraignment before a magistrate and be confronted by his accuser on an examination	Yes	No
3. To have case considered by grand jury	Yes	No
4. To be tried by an impartial jury of citizens	Yes	No
5. To subpoena witnesses and cross examine them[2].	Yes	No
6. To be tried before an impartial court which is not accountable to anyone for its decision	Yes	No
7. To argue appeals by counsel	Yes	No

The Government contends that A. W. 70 is for the guidance and benefit of the superiors only and that the defendant has no rights thereunder.

Hence a soldier is entitled to be tried by a group of officers appointed by his commander in lieu of the safeguards a citizen is entitled to as delineated above.

The Government offers little incentive to a citizen to become a member of the armed forces of the United States.

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[1] The soldier is only entitled to counsel at the court martial hearing. He is entitled to none at the A. W. 70 investigation (Government Brief, P. 20).

[2] The soldier can have witnesses "if available." There is no power of subpoena (Government Brief, P. 20).

In addition to pledging his life if needs be in the defense of his country, as a matter of law the Government contends all rights under the Constitution are substantially denied him.

It has been held that soldiers or men in the armed forces are entitled to the fundamental protection of the Constitution. It is of utmost importance that every citizen, civilian or soldier, be entitled to reasonable safeguards to protect him from oppression and to preserve his dignity as a citizen. The soldier receives little by way of protection under the Court Martial Law as it now exists, conceding that the fair and impartial investigation under A. W. 70 is jurisdictional. If A. W. 70 is not jurisdictional the soldier is stripped of practically all rights.

POINT II.

The investigation under A. W. 70 was not thorough.

(a) The thorough investigating officer made no investigation concerning the reputation of the complainants for chastity in the community in which they lived.

(b) Mrs. Kerry was the only disinterested witness re identity. She was not interviewed by the impartial investigator. No explanation is offered for such failure. Miriam Cullum, while walking with Mrs. Kerry, met her assailant. A conversation was carried on between the assailant, Cullum and Mrs. Kerry. They apparently walked some distance together (R. 164-165).

The defendant testified at the hearing that he requested Todd to question Mrs. Kerry and that Todd advised him

that from a defense standpoint it would be advantageous to his case if Todd did not question Mrs. Kerry.

Todd testified as follows:

"Q. At the time you were interrogating various witnesses with respect to the matter did the name of Mrs. Kerry come up?

A. Yes, the name of Mrs. Kerry did come up.

Q. Do you know what attempt, if any, was made to interrogate her and any reason why she wasn't?

A. So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said 'no'."

No witness corroborates the Cullum girl's testimony at any point excepting that someone saw her crying after her alleged assault. She did not complain to the police or authorities until a week had elapsed. These facts made Mrs. Kerry's testimony of greatest importance. Prompt complaint of an assault or attack might be considered corroboration, but a complaint made a week later is no corroboration whatsoever.

(c) Todd was not thorough by failing to have a doctor look at the laceration and give an expert opinion as to whether it was a bite or a cut. A bite would cause two wounds—Smith had but one wound. He was required to make a thorough and impartial investigation. He acted as a prosecutor in determining that "her testimony was not necessary from a prosecution standpoint." He was not thorough in that if the investigation was competently made he either knew or should have known that Mrs. Kerry's testimony was of greatest importance.

"The investigation of the charge was not thorough in that it was not made competently." *(Hicks v. Hall*, 64 F. Supp. 238; *Tatham v. Hunter*, 71 F. Supp. 823.)

"The thorough and impartial investigation under A. W. 70 is jurisdictional." (*Hall v. Hall*, supra; *Anthony v. Hunter*, supra.)

(d) Todd conducted the investigation in this case solely on the affidavits presented him by the British police officer when Todd was Provost Marshall. The only important disinterested witness who could identify the assailant of Miriam Cullum was Mrs. Kerry. She was never interviewed by Todd.

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[4] An examination of the statements contained in the pre-trial investigating officer's report indicate that every complaining witness's statement was taken from the pocket book of Constable Felton who worked with Todd. The order of the statements as taken from the book is as follows:

Name of Witness	Date and Time of Statement	Page Appearing in Constable Felton's Book
Dr. Beckett	10:15 A. M. July 12	111-112
Sheila Dale	10:30 A. M. July 12	112-119
Ellen May Dale	3:30 P. M. July 12	122-125
Pamela Dale	11:00 A. M. July 13	125-129
Betty Goodall	12:15 P. M. July 13	129-130
Miriam Cullum	7:00 P. M. July 17	131-137
Frank Wolfard	7:30 P. M. July 17	138-139

Supplemental statements taken at Raydon Aerodrome by Todd and Felton in Todd's office on July 18th after the lineup:

Sheila Dale	7:45 P. M. July 18	141
Miriam Cullum	7:45 P. M. July 18	142

Todd's investigation of the People's case consisted of copying the items out of Constable Felton's notebook. The pages aforesaid are almost consecutive and cover the period in the Constable's book from 10:15 A. M. July 12, 1944, the last ones being the supplemental statements of Sheila Dale and Miriam Cullum and being taken by Todd and Felton at 7:45 P. M. on July 18th at Raydon Aerodrome.

(e) Smith claimed at Lewisburg that Todd advised him not to call Mrs. Kerry on some theory that it would be to Smith's advantage (R. 20).

Todd was a lawyer and either knew or should have known the law. He advised Smith not to call Mrs. Kerry (R. 20). He did not do anything towards investigating the Government's case subsequent to his appointment as impartial investigator.

(f) As A. W. 70 investigator he merely approved his own findings and determination made when he was acting as Provost Marshall. That determination resulted in Smith being put in jail on the afternoon of July 18th at 1600 o'clock of at 4 P. M. (R. 74). Todd certainly believed Smith guilty or he would not have arrested him.

(g) The defendant was able to produce a reputable woman from the community who testified that Sheila Dale had a bad reputation. She started to testify that Miriam Cullum was also of a bad reputation. It was ruled out on an objection (R. 229). That information certainly was available to Todd had he elected to make such an investigation. In a rape case, character and reputation of the complainants is of great importance (*Hicks v. Hiatt*, supra).

For these reasons the investigation was not thorough.

Mrs. Kerry was the ONLY Disinterested witness as to identity of the assailant. There is no explanation as to the failure of the Government or the Court to call Mrs. Kerry.

Mrs. Kerry was the only person other than the Dale and Cullum girls who saw the assailant at sufficiently close

range to identify him. Miriam Cullum testified that she was just leaving Brantham about 20 minutes to 11 on July 11th with Mrs. Kerry (R. 164). Mrs. Kerry was walking and the Cullum girl was pushing her bicycle that while so walking an American soldier came back and asked where they were going and Mrs. Kerry made some reply. He then asked if he could see them home and Mrs. Kerry said, "No, thanks." When they got to the Crown Public House "he was still walking along the side of us and asked us where we lived." Mrs. Kerry replied she lived at Brantham and they continued to walk on. When they got to a point between the two bridges "the American moved off and asked if he could see us home and Mrs. Kerry said, 'No, thanks.' Then she said goodnight to me and I got on my bicycle and at the bridge he caught me up" (R. 165). The American referred to above was the assailant of Miriam Cullum. Mrs. Kerry was the most important witness in the entire case had she been called. There is no explanation for the prosecution not producing Mrs. Kerry. When the prosecution failed the Court should have called Mrs. Kerry. The defendant according to his affidavit stated that he wanted to see Mrs. Kerry with Lt. Todd and Todd advised him not to see her; that if he was not with Mrs. Kerry the night in question that then Mrs. Kerry could testify truthfully that she had never seen the defendant before in her life. The defendant was lulled into security, believing that she would be present at the trial and the prosecution double-crossed the defendant by not producing her as a witness.

Two Constables Were Available as Witnesses.

The two special policemen who passed Mrs. Kerry, Miriam Cullum and her assailant could have testified as to the identity of the assailant. The special policemen apparently

knew the assailant in that he said "they are always after me" and the constables spoke to Miriam and her assailant (R. 171). As public officials and policemen they were readily available.

POINT III.

The examination was not impartial.

Todd first learned of the offense complained of herein when the British constable came to consult him as Provost Marshall of the Raydon Aerodrome at 11 A. M., July 18, 1944, complaining that two British girls had been molested (R. 31). That was the first time Todd knew that anything of this type had happened. The British constables and Todd questioned 8 or 9 men between 11 A. M. and 3:30 P. M. on July 18th, prior to questioning Smith (R. 200). Todd said that both he and the British police questioned Smith (R. 32). Smith testified at Lewisburg that he was questioned by Todd and the British constables for about 2 hours. Felton said to Smith: "Show me your hands." He was not advised that he was suspected of a serious offense. Felton saw a scab on the ball of the left thumb (R. 193). Smith said he was cut by a cleaver opening cans (R. 211). Todd arrested Smith and put him in jail at the conclusion of the questioning. He was jailed 1600 o'clock (R. 74). Todd said:

> "I took his commanding officer into his cell and asked Smith if he had any objection to any type of lineup and he said he had not." (R. 32).

Smith was taken out of his cell to attend the identification parade which took place about 7:15 P. M. on July 18th

(See statements of Miriam Cullum and Sheila Dale (Exs. B, B. 1, 2, 3 and 4).

At the conclusion of the identification parade Smith was returned to his cell by Todd (R. 32).

At 7:45 P. M., July 18th, after the lineup, Todd and Felton took additional statements from Miriam Cullum and Sheila Dale (Ex. B, P. 1, 2, 3 and 4.) (R. 176.). The girls were in Todd's office (R. 17 and 135); his office was in the guard house (R. 13). One girl testified she gave her statement, Exhibit B, to Todd (R. 176).

Todd was running the entire proceeding. Smith testified at Lewisburg that Capt. MacGregor sent for him and said that Todd wanted him to appear before him with Capt. MacGregor (R. 13). The questioning, according to Todd, was done by him and the British constables (R. 32). Todd testified he brought Capt. MacGregor to see Smith in jail so that MacGregor could protect Smith's rights (R. 32). All of this transpired on July 18th, prior to charges being filed.

On July 19th, after Todd had made a report, Capt. Ernest P. MacGregor signed charges alleging that Smith had violated the 92nd and 93rd Articles of war, on information and belief. Todd was the accuser in fact and his charges were adopted by Capt. MacGregor. This was a violation of army regulations (Digest of Opinions of J. A. G. of the Army, Sec. 428, Page 293; Winthrop Military Law, Vols. 1 and 2, Reprint of 1920, Pages 61, 62 and 63, Sec. 73 and 74.)

Summary.

Todd as Provost Marshall under A. W. 24 (R. 33)

(1) Had MacGregor summon Smith to be questioned; (R. 13)

(2) Questioned the British constables and thereby summoned Smith for the hearing; (R. 31, 32).

(3) Had Smith before him once before on some other difficulty wherein Smith claimed Todd had threatened him (R. 12 and 27)

(4) With the British constables questioned Smith, (R. 37) according to Smith for 2 hours; (R. 28, 29 and 30)

(5) Had Smith confined to jail after questioning; (R. 32) (He was in his cell) (R. 74) (Date of confinement 1600 hgs. or 4 P. M. 7-18-44) (R. 74)

(6) Brought MacGregor to Smith's cell to inquire with regard to the lineup to protect him; (R. 32)

(7) Arranged for the lineup; (R. 32)

(8) Took supplemental statements from Sheila Dale and Miriam Cullum, the complainant in each case; (Ex. B; P. 1, 2, 3 and 4); (R. 258, 259, 260 and first paragraph of R. 90, 91, 92 and 93) at 7:45 P. M. at Rayden Aerodrome after lineup.

(9) Had Smith returned to jail; (R. 33)

(10) All these things happened July 18, 1944, two days prior to his appointment as impartial investigator under A. W. 70; (R. 99)

(11) Based on Todd's investigation as set forth above, on July 19th MacGregor preferred the charges; (R. 74, 75 and 76)

(12) July 20th Todd was appointed impartial investigator under A. W. 70; (R. 29)

(13) TODD AT THE TIME OF THE APPOINTMENT HAD HAD SMITH IN JAIL FOR TWO DAYS.

(14) As a matter of law he could not be impartial.

The Impartial Investigation by Todd Was a Farce.

No witness was called at the impartial investigation who added anything to the statements which were taken by Todd prior to his appointment as impartial investigator (See pre-trial investigating officer's report; Ex. A, P. 1, 2, 3 and 4; Exhibit B, P. 2, 3, 4, 5 and 6 and Ex. C.)

Todd's impartial investigation consisted of going through certain motions to comply with A. W. 70. On July 24th, the date he filed that report, the only additional facts that he had acquired were: Pvt. William Vandergrift saw Sheila Dale crying at her home (Ex. A, P. 3) at about a quarter to 12. The following statements were taken from the following persons on the following days:

Frank Albert Welham	July 17, 1944
Pamela Joy Dale	July 13, 1944
Ellen May Dale	July 12, 1944
Frederick Harry Eli Beckett	July 12, 1944
Betty Goodall	July 13, 1944
Wilfred John Felton	

(These affidavits were taken by Constable Felton and turned over to Provost Marshall Todd on July 18th. He later put them in his A. W. 70 report.)

At the time Constable Felton first consulted with Todd on July 18th he had all those statements in his book at Pages 111 to 139 (Ex. B, 1, 2, 3, 4, 5 and 6). After the lineup Todd and Felton took supplemental statement at pages 141-142 of Felton's book and presumably turned them over to Todd. Todd did not learn any single fact concerning this case after his appointment under A. W. 70 that he did not have in writing on July 18th, two days prior to his appointment.

POINT IV.

The Government has changed its theory in this case.

At the hearing at Lewisburg, Smith contended that the identification lineup was conducted by Todd on the evening of July 18th, four hours after he was first quizzed by Todd. Todd claimed that the lineup took place a week after July 18th, when he was acting as investigator under A. W. 70. The attorney for Smith requested in open court the date of the appointment of Todd as A. W. 70 investigator, and it was missing from the government record (R. 36-37).

Counsel for Smith discovered the appointment while examining the record on the day of argument in the Court of Appeals, April 8, 1948. Todd was appointed investigator under A. W. 70 on July 20th, two days after the lineup was conducted and two days after he took the last statement of the two complainants. The Government now admits substantially all of the defendant's contentions excepting they deny that Todd assisted or participated in the taking of the statements on July 18th at 7:45 after the lineup.

POINT V.

The statements were taken by Todd and Felton on July 18 at 7:45 P. M. at Raydon Aerodrome.

Judge McLaughlin in the court below commented concerning Todd's taking of the statements (Ex. B). The Government in its brief (P. 15, footnote 7) said that Judge McLaughlin was mistaken. *Judge McLaughlin was not mistaken.* The facts are Exhibit B, P. 1, 2, 3 and 4, is a statement of Miriam Collum[1] and a statement of Sheila Dale. From examining the photostatic copies of the statements it is clear that both statements were typewritten at the same time. The last paragraph of each statement states "at 7:15 P. M. on Tuesday 18 July 1944 I attended an identification parade at the Raydon Aerodrome * * *." Their signatures appear after that statement. After the signature appears:

> "Original statement taken at 7 o'clock July 17, 1944 at 57 Colchester Road and at 7:45 P. M. on July 18, 1944 at Raydon Aerodrome."

The Government admits that immediately following the identification parade each girl gave Felton another statement (P. 6 of brief), but denies Todd was present. The question is: Did Todd participate in taking the statements?

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[1] The record in connection with this citation is garbled—see stipulation. The statement proper appears at 258, 259 and 260. The balance of that statement is contained at Page 90, containing that matter preceding and not including the words "Statement of Frank Albert Welham."

The two girl complainants were brought to Raydon Aerodrome for the identification parade. Constable Felton testified that Miriam Culliton was in Lt. Todd's office at the time Sheila Dale was at the identification parade (R. 195); that Miriam Culliton went back to Lt. Todd's office when Sheila Dale came out to attend the identification parade (R. 195). At the trial one of the girl complainants *testified she gave the statement, Exhibit B, to Lt. Todd on July 18th.* This statement was marked "Exhibit B" (R. 176), and Judge McLaughlin in his opinion commented thereon at R. 278:

> "Exhibit B for the defense referred to at the trial as 'statement of Sheila Dale to Lt. Todd' appears to be a record of such interview * * *." (R. 278)

Exhibit B was taken in part at 7:45 P. M. on July 18th in Todd's office at Raydon Aerodrome. Smith testified at Lewisburg that the girls were in Todd's office prior to the lineup (R. 176) and that the windows on Todd's office faced in the direction where the lineup was being conducted. Todd's office was in the guard house (R. 13). Both girls were in Todd's office immediately prior to the lineup and returned there thereafter. Todd conducted the lineup (R. 32) and Felton was also present and so testified (R. 195). It definitely appears and is nowhere disputed that the girls were brought to Todd's office at the Raydon Aerodrome for the purpose of attending the lineup. Each separately viewed the men in the lineup and returned to Todd's office (R. 195). Smith was originally interrogated in Todd's office by Todd and Constable Felton. Todd said he was conducting an A. W. 70 investigation (R. 33). They now allege that Todd's signature appears on the girls' statements by reason of certifying same at the A. W. 70 investigation, and that he did not participate in the taking of the

statements or was even present when they were taken. This is a new claim by the Government. The Court below, in its opinion, noted that the Government raised no issue in this matter (R. 279). Todd did participate in the taking of the statements and the conducting of the lineup and the general investigation under A. W. 24 (R. 33).

Todd testified and the Government argued that Todd conducted the lineup and all pertinent phases of the investigation as A. W. 70 investigator a week later. The defendant denied this fact and has conclusively proved that such was false. The Government now admits that Todd was in error (Footnote 9 of brief). Todd himself said he was conducting this investigation under A. W. 24 (R. 33). The Government now urges that in the course of his conducting the identification lineup with the British constables the girls were held in Todd's office and statements were taken by Felton, but that Todd simply didn't know about it. This is false. The Government suggests that Todd was as lax in his A. W. 24 investigation as he was in the A. W. 70 investigation later.

POINT VI.

Todd was acting as the accuser and Provost Marshall at all times in this proceeding.

All witnesses at the trial, and every person who made a written statement, stated the lineup was July 18th at about 7:30 to 7:45 P. M. No witnesses disputed the time. At Lewisburg Todd told how he arranged the lineup (R. 32-33). Concerning his actions immediately after the lineup he testified as follows:

Q. Subsequently was Smith brought into the PX [illegible] Marshall's office?

A. Smith was taken to his cell and his captain went [illegible] and I asked Smith if he thought the line-up was conducted in a fair manner, and he said it was but still protested his innocence. At no time did I threaten Smith and tell him that he had to answer questions or his right to get into the lineup or I would bring the girls into the cell. *I was acting under the 24th Article of War.*" (R. 33)

The 24th Article of War provides as follows:

"ART. 24. *Compulsory Self-Incrimination Prohibited.* No witness before a military court, commission, board of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, *or before an officer conducting an investigation*, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to incriminate or degrade him." (Emphasis supplied)

Todd, the [illegible] admitted he was conducting an investigation. His duty was to conduct the investigation so that [illegible] Provost Marshall. Todd was appointed [illegible] investigator under A. W. 70 July 20th. The charges were filed July 30th. He could not have been appointed [illegible] investigator prior to the filing of the charges. See, 70, A. W. Todd, therefore admitted by implication that he was the accuser in fact and the [illegible] investigator provided by law under A. W. 70 was a farce.

Todd having conducted the inquisition under A. W. 24 stated:

"Q. Prior to the time of your having been appointed investigating officer under A. W. 70 had you formed any opinion in your mind as to the guilt or innocence of the accused?

A. I had not. I was of a perfectly fair mind. When I was appointed investigating officer I wanted to get at the truth of the matter." (R. 33)

At that time Todd had arrested Smith and locked him up for two days in jail.

The foregoing question and answer is so apparently erroneous or false it is unnecessary to discuss the same.

Concerning Todd's explanation of the absence of Mrs. Kerry, the impartial witness, he stated as follows:

"So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said 'no.'." (R. 35)

Todd by that answer admitted that he was judging the case from the prosecution standpoint and Smith apparently was conducting his own defense. At one point he called in Capt. MacGregor to protect the defendant (R. 32).

A. W. 70 Investigation by an Accuser is Illegal.

"The course of administration involving action by one and the same officer as accuser and investigating officer in the same proceeding met with the disapproval of the Secretary of War." (Digest of Opinions of the J. A. G. 1912-1940, P. 293, Sec. 428.)

"Investigation by Accuser. Several records of trial by general court-martial received in the office of the Judge Advocate General indicated that some confusion

existed in the service as to the requirements of A. W. 70 regarding the 'thorough and impartial investigation' of charges. The validity of the sentence in each of the cases covered by those records was brought into question by reason of the fact that the investigation conducted under the second paragraph of A. W. 70 has been made by the officer signing the charges under the oath prescribed by the first paragraph of that article. The course of administration thus disclosed, involving action by one and the same officer as accuser and as investigating officer in the same proceeding, met with the disapproval of the Secretary of War.,

Accordingly, under date of January 15, 1929, instructions were communicated, by order of the Secretary of War, to each officer exercising general court-martial jurisdiction, directing that steps be taken to make certain that the investigation required by the second paragraph of A. W. 70 be made by an officer other than the signer of the charge under investigation. '250.45, Jan. 10, 1929.'" (Digest of Opinions of the Judge Advocate General of the Army, Section 428 at Page 293.)

Todd Was the Accuser in Fact.

Construction of terms "Accuser" and "Prosecutor":

"as indicated by the use of the disjunctive 'or' these terms are evidently intended to bear a somewhat different signification. To distinguish therefore the two designations *'accuser is construed to mean either one who originates the charge or adopts and becomes responsible for it;* 'prosecutor' one who proposes or undertakes to have it tried and proved * * * * * * where having personally originated or adopted the charges, he has preferred them as his own, or

caused them to be preferred accordingly by another person with the purpose of having them brought to trial he is in general properly the 'accuser' even if he may occupy no hostile or adverse position towards the accused. So, if influenced by hostile feeling, or by a conviction that the accused is guilty and that his offense demands to be promptly and efficiently dealt with, *he proposes upon assembling the court actively to promote the prosecution, as by instructing the judge advocate facilitating the attendance of witnesses for the prosecution, appearing himself as a prosecuting witness, &c., he is properly to be deemed a 'prosecutor' within the meaning of this article,* and it will not be legal for him to order the court, but the president must be resorted to for the purpose." (Winthrop's Military Law and Precedents, Vols 1 and 2, Reprint of 1920, Pages 61, 62 and 63, Sections 73 and 74.) (Emphasis supplied.)

POINT VII.

U. S. District Judge Follmer's decision was predicated on an erroneous statement of fact by the Government.

The Government at Lewisburg advised the Court that they could not find the date of Todd's appointment as impartial investigator under A. W. 70 (R. 36, 37). Judge Follmer decided this case without knowing the true date Todd was appointed impartial investigator. Counsel for the defendant in Philadelphia just prior to argument of this case on April 8, 1948, found Todd's appointment as impartial investigator at Page 54 of the photostatic record

(R. 99) as filed with the Clerk of the Court of Appeals. The date of this appointment was of utmost importance. Todd was wrong and the Government now admits the error. Todd actually made all of pertinent investigation under A. W. 24 and prior to his appointment under A. W. 70. The Government relied on the erroneous testimony of Todd and the Judge accepted same. When the true facts appeared the Judge had already made his decision based on a fact which was false.

Had Judge Follmer been given the true date of the appointment it would have changed the entire law of the case and undoubtedly changed his decision.

The defendant requested the Government to provide a photostatic copy of every paper in the file. This request was denied by the Government on the ground that such information was confidential. At the Lewisburg hearing counsel for the defendant requested the date of the appointment in open court (R. 99) and he was advised that the date of such appointment was not in the file.

POINT VIII.

A. W. 70 was not substantially complied with in the case at bar.

Judge McLaughlin in his opinion stated:

> "In the present matter we are not faced by some necessary informality of investigation but by the lack of its two essentials, thoroughness and impartiality." (R. 282)

Concerning the impartial investigator, Todd:

> "The government asserts that, as he testified at the

habeas corpus hearing. Todd had a completely open mind and was seeking only the facts. Unfortunately, as his testimony clearly shows, he considered the full facts ultimately. He was asked why he had not examined Mrs. Kerns, the only person actually named in the investigation outside of the complaining witnesses, who had seen the offending soldier closely. He answered: "So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said "no".' Such reply cannot be said to account satisfactorily for the elimination, without at least reasonable inquiry, of this vital witness. Todd's attitude, as he himself explains it, is interesting. Under A. W. 70 and in common fairness to Smith, the investigation had to be thorough and impartial. Its purpose was not only to present the prosecution with a case that would support conviction but to put before the court-martial authority at least a substantial picture of what happened, based on all essential evidence. This was not done." (R. 280)

Judge McLaughlin digests the facts in this case in a most thorough and complete manner. The opinion of the court below is an important argument on the facts and law for the respondent.

POINT IX.

There was no corroboration of either girl's testimony.

1. Sheila Dale made an outcry when she got home. This is not corroboration. The fact she did something when she got home means no more than as if she said it in court. She cannot corroborate herself.

2. The record discloses that Constable Felton found some grass tread down. There is no testimony in the record that anyone pointed the place out to him (R. 192). No foundation was laid for that testimony.

3. Betty Goodall testified she heard a scream about 10:30 and there was no fright in it (R. 189). It just sounded ordinary.

4. The complainant testified her glasses were not knocked off. (R. 137)

5. The doctor said she was not a virgin. (R. 153)

6. There were no marks about her privates indicating that she had had intercourse with anyone and of course no evidence of rape. (R. 155, 156 and 157).

7. She went to Dr. Beckett. "She came complaining that she had been raped by a man and no contraceptives had been used and she was worried about it in case she became pregnant" (R. 154). She made no complaint to the police from 12 o'clock that night until she came to the doctor about 10 o'clock the next morning. Then the doctor called the police. (R. 152)

8. The doctor testified he could not say she was raped. (R. 156).

The doctor said, "I treat a person who has had a rape[illegible] (R. 367). She had some bruises on her [illegible] (R. 367).

7. She [illegible] (R. 124). He dragged her [illegible] (R. 125). She started to scream and when he said to stop or he would kill her she stopped. He took her knickers off (R. 124). He inserted his penis (R. 125) without any assistance from her. She said he was on her 4 or 5 minutes. During that period of time she evidently cooperated with him. At 11:45 he gave her her knickers and she put them on (R. 126). They kissed and made a date for the following Thursday (R. 126) and then she went home. She arrived there at 12 o'clock (R. 126).

10. At the time she started for home she began to plan to claim she was raped for the purpose of preserving her appearance. Her attitude in mind at that time squared with the theory of Patthammer on Rape in the Illinois Law Review (cited).

11. During the rape her glasses were not knocked off (R. 137). Her knickers were removed without any ripping or tearing (R. 138). The intercourse was of an unusual duration (4 or 5 minutes). She didn't scratch him. She didn't attack him. She said if she kicked him in the crotch she might hurt him. (R. 142)

12. The police were not called that night or the next day. In fact the police were never called by her or her family who knew the story and she went to the doctor's for the purpose of finding out if she was pregnant. At the trial

evidence was adduced to indicate she was of bad moral character.

From the foregoing:

(a) There is no credible evidence of rape.

(b) There is no corroboration.

(c) The identification rests solely on Sheila Dale.

(d) The alibi is substantiated by 6 or 7 American soldiers.

(e) The cut on Smith's hand meant nothing in Sheila Dale's case.

POINT X.

There is serious question as to whether a rape in fact occurred on Shiela Dale.

She didn't report it to the authorities until she was being examined by a physician the next day to ascertain whether or not she was pregnant. Then the physician reported it to the authorities. The physician stated that she was not a virgin and that he could not testify that she had intercourse recently. She was not bruised inside and she only had three bruises on her body—one on her right thigh, her left knee and left arm, which could have been caused by the bicycle fall (R. 178). There were no marks about her neck although she testified that he put his hands on her throat and told her if she didn't stop screaming he would murder her (R. 124). Her glasses were not knocked off and she said she struggled with him (R. 137). She didn't put up much of a fight. She said she kicked and struggled but the

only thing she apparently accomplished was that she kicked off her knickers (R. 138). She didn't kick him in the groin because she thought it might injure him (R. 142). She said he was hurting her although she seemed to know that he did not put on any contraceptive (R. 142).

In fact, the examining physician testified:

> "Q. When this girl came to you did she come with a view to getting this 'prostigmine' test for pregnancy?
>
> A. No. She came claiming she had been raped by a man and no contraceptives were used and she was worried about it in case she were pregnant." (R. 154).

Dr. Davidson testified there was semen on her knickers but there is no evidence as to where the semen came from and there is no evidence indicating whether or not she had relations with the boy she was out with previously that evening—"Kentucky" (R. 149). She was not even asked the question. Under the circumstances there is grave doubt as to whether or not she was actually ravished, considering her reputation in the community, her perfunctory defense and her failure to report the matter to the police; although she might have had intercourse that evening. Had the doctor not called the police for the purpose of protecting himself the matter probably would never have been reported to the authorities. There was ample time between midnight and 10 o'clock the next morning to call the police before she went to the physician to ascertain whether or not she was pregnant.

Betty Goodall testified she heard a scream about 11 o'clock which was "ordinary", and there was "no fright in it" (R. 190). This was about a half hour before Sheila Dale was assaulted.

> "Mere verbal protestations and a pretense of re-

sistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to and are called for by the circumstances, the inference may be drawn that she did in fact consent.

It has been said of this offense that 'it is true that rape is a most detestable crime' * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent'." (149 b MCM P. 165.)

The law of England provides as follows:

"In cases of rape and other sexual offenses against women, girls and boys, the jury may convict on the uncorroborated evidence of the prosecutrix or prosecutor but the judge should warn them that it is dangerous to do so.

The Court of Criminal Appeal may quash a conviction in the absence of an adequate warning (k) or if the evidence which is referred to by the judge as corroboration is not corroboration (l) or is doubtful.

Evidence of a complaint made by a prosecutrix or prosecutor is not corroboration of her or his evidence since it lacks the essential quality of coming from an independent quarter."

(*Halsbury's Laws of England, Criminal Law & Procedure*, 2nd Edition, Vol. LX, Part VI, Sec. 314.)

"No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported

by other evidence." (*Penal Law of New York*, Sec. 2013.)

"If the commission of a sexual act becomes known the prosecutrix is impelled by many motives of self-interest to assert that it was done criminally. She has every selfish inducement to bring about a conviction, as every ground of acquittal, except possibly mistaken identity, would involve a reflection on her." (*Puttkammer, Consent in Rape* (1925) 19 Ill. L. Rev. 410, 421.)

In *State of New York, Law Revision Commission Report, Recommendations and Studies*, 1937, Page 473, it is stated:

"The courts have always been cautious in dealing with these crimes and have been very reluctant to uphold convictions resting wholly upon the testimony of the prosecutrix. At an early date Sir Matthew Hale warned against the danger of such convictions and observed:

" * * * it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent; * * *"

and that we should:

"be more cautious upon trial of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident

testimony, sometimes of malicious and false witnesses.". (1 Hale, P. C. 635-636.)

Judge Cowan, writing for the Court of Appeals for the State of New York in *People v. Abbot*, 19 Wen 192, stated:

"Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. A mixed case will not do. The connection must be absolutely against her will. The People v. Morrison, 1 Parker Criminal Report 625, the Court stated: 'The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite and a voice to cry out; all of these should have been put in requisition in defense of her chastity.' It therefore follows that a passive or perfunctory resistance is not enough. Her resistance had to be active in proportion to the outrage. People v. Carey, 223 N. Y. 549."

In *People v. Dohring*, 59 N. Y. 374, Page 383:

"Of course the phrase 'the utmost resistance' is a relative one and the resistance may be more violent and prolonged by one woman than another or in one set of attending physical circumstances than in another, but whatever the circumstances may be there must be the greatest effort of which she is capable therein to foil the pursuer and preserve the sanctity of her person. If she is conscious of what is attempted and has the possession of natural mental and physical powers in usual degree, and is not overawed by the number of assailants, nor terrified by threats of death or the like, nor in such place and in such position as that re-

sistance is useless. She must resist until exhausted or overpowered for a jury to find that it is against her will."

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION IN THE CASE OF MIRIAM CULLUM.

She did not make a complaint to the police until a week had elapsed. At that time even Constable Felton did not attach much significance to her claim until the "actual words" were added to her original version. At first she did not mention the "actual words" (R. 197). Someone either refreshed her recollection or suggested that her complaint would somehow aid Sheila Dale's case. At the time the complaint was made (July 16th, five days after the assault R. 197), she told Constable Felton she bit her assailant. On the following day the Constable went to Raydon Aerodrome, and, as set forth hereinbefore, examined the hands of the eight or nine soldiers brought before him by Lt. Todd for examination. She said unequivocally that she bit the right hand (R. 259) of the defendant. Constable Felton effected his identifications by means of the scab on the defendant's *left hand* (R. 193). At no point in her testimony did she describe the severity with which she bit her assailant. No mention is made as to whether or not blood was drawn. In the Raydon Aerodrome there must have been available physicians who could have easily noted the distinction between a bite, which is in fact a pinch or a squeeze which would leave the imprints of the upper and lower teeth, and the laceration which was on the defendant's left hand and which was caused by a cleaver. This was a very important factor. From reading the testimony the Court must take judicial notice that the entire case

hinged on the identification via the cut on the hand. The Government, rather than call a physician, relied on the lay testimony of Constable Felton that the cut on the defendant's hand could not have been made with a knife or cleaver. He made no examination of the teeth or appearance of the defendant as suggested by the complainants (R. 199) but merely relied on the cut on the hand. At that time Smith advised the Constable that he had suffered the laceration from a cleaver (R. 199).

Sgt. Pelletier testified that he was present on Thursday at around 9:30 when Smith came to him with a cut on his hand; that at the time Smith said he got it while opening cans with a cleaver. He didn't actually see the accident but he knew what Smith was doing. He saw the blood running. He was his Chief Cook and superior officer (R. 227), and Sgt. Pelletier dressed the cut for him (R. 229). Sgt. Pelletier stated that in opening cans with a cleaver a person was likely to get cut most anywhere (R. 230). A physician might have determined on July 18th not only whether the cut was from a cleaver or a bite, but he also might have been able to tell from the nature of the wound by examination as to whether or not it was five days or seven days old. This evidence in and of itself was sufficient to constitute a reasonable doubt as a matter of law.

The Court fell into error in combining the testimony of Sheila Dale and Miriam Cullum in such a manner so as to determine that the defendant was guilty in both cases, whereas in fact when the cases are severed and analyzed separately there is insufficient evidence in either case to warrant a conviction.

POINT XI.

The relator conclusively proved he was in the Raydon Aerodrome at the time the alleged offense occurred.

Time was of greatest importance in establishing the defendant's alibi. Dale testified she left her assailant at 11:45; that she got home at 12 o'clock, about 5 minutes after she left her assailant (R. 144). In that she was corroborated by her sister, Pamela Dale (R. 158) and Pvt. Vandergrift (R. 162). In her statement, Exhibit B, Page 3, she said she got indoors just after 12 o'clock. Her mother said she got home just after 12 o'clock (Exhibit B, Page 5). She said it was dark enough so that she couldn't ride her bicycle without lights (R. 120); that it was getting pretty dark (R. 133). It took her 5 minutes to get home. Sunset was 10:19 British War Time. Twilight ended and full darkness began 50 minutes later, or 11:10 P. M. (Nautical Almanac for 1944 and British Meteorological Glossary, 3rd Ed.)

Court's Exhibit 1, the official passbook (R. 258), indicated the defendant entered camp at 23 o'clock, which was the nearest hour to the time the defendant entered camp (R. 247). That book was kept to record the time the men check in (R. 248).

Defendant met Pvt. Andy Partyka, who was evidently a little intoxicated, and rode into camp with him without stopping, at about 11:30 (R. 219-220).

Harrison Wakeley, government witness, sentry at the gate, saw the defendant enter the camp about 11:45. He was relieved from duty that night at 11:50 and he said it

could have been a half hour before he left his post that Smith entered the camp (R. 203). That would be about 11:20. The sentry had a duty to ascertain to observe what was going on, to allow no one to pass without proper authority and to represent the commanding officer. (Basic Field Manual 193-194.). The government having called this witness and vouched for his credibility, and which witness had the duty of observing what was going on, should be bound by his testimony. If the government doubted his credibility or accuracy they could have called the sentry who succeeded Wakeley on duty to ascertain as to whether or not Wakeley actually went off duty that night at 11:50. Shiela Dale and all of said complainant's witnesses were specific in stating that she got home at 12 o'clock and that it took 5 minutes to get from the scene of the offense to her home. If Wakeley actually saw the defendant entering camp some time prior to 10 minutes to 12, and considering it was five miles' travel up hill from the scene of the offense to the camp, the defendant could not have been the assailant.

Sgt. Pelletier was Smith's superior officer. He saw Smith shortly after the A.F.N. news bulletin, a U. S. government radio hookup in England. He saw the defendant enter shortly after 11 o'clock (R. 225, 226). "I recall the A.F.N. news and about 15 minutes later the B.B.C. came on (R. 228). The A.F.N. news ended some time between 11 and 11:15 (R. 228), and the defendant came to the Sergeant's room less than 10 minutes after the A.F.N. went off the air (R. 226). The defendant requested the Court to take judicial notice the A.F.N. went off the air at 11:05 every night, which was refused. The T.J.A. refused to stipulate this fact although said information was readily available. The T.J.A.'s duties required him not to suppress any evidence

favorable to the defense and act inconsistent with a general desire to have the whole truth revealed (M.C.M. 41-d). The Court ordinarily should have taken appropriate action with a view to obtaining such additional evidence as was necessary for such determination (M.C.M. Sec. 56, Page 58).

"The defendant was entitled to be tried fairly." (*Hicks v. Hiatt*, supra.)

1st Sgt. Robert H. Hayes testified he saw the defendant at 11:30 to 11:45 in the kitchen mess hall (R. 231). He was positive as to his information (R. 232).

S/Sgt. Edward R. LaPage said he saw the defendant in the mess hall between 11:15 and 11:30 (R. 233).

Sgt. Stanley T. Pleban saw Smith about 11:30 (R. 237).

The defendant was relying on an alibi. The complainants testified that he committed certain actions at a certain time. He conclusively demonstrated that he was not there at the time alleged. The reviewing authorities have indicated that the girls might have been mistaken concerning the time. If so, the testimony concerning the darkness as taken from the official almanac is strong supporting evidence of the defendant's alibi.

Sheila Dale was characterized over the objection of the government as a girl of bad reputation as to chastity (R. 238). Her testimony was accepted and the six soldiers' testimony was rejected. "The government accepted every statement made by Sheila Dale as being the absolute truth with the exception of her statement as to the time of the occurrence of the attack. On this they feel that she might be in error. That was the only subject which the defendant was able to attack. Having successfully controverted and

defeated this issue of time the government indicates that the time really was not of much consequence when, as a matter of fact, it was of tremendous importance.

The District Court Gave Great Weight to Partyka's Testimony.

In riding home with Partyka, Smith is alleged to have said that he had a girl that night. This is not evidence of the commission of a crime nor in fact any evidence at all. Yet the Court accepted that evidence and the District Court quoted the same although all other portions of Partyka's testimony even when corroborated by the sentry at the gate and soldiers in camp was disregarded.

POINT XII.

The Government theory of the law in the case was erroneous.

The Government case started on the premise that the same person committed both crimes. Both cases were tried together with the same witnesses although there were two separate and distinct offenses, each one of which had to stand on its own facts. The evidence was intermingled to the point that the evidence was construed by the Court as cumulative and mutually corroborative. This was error. (Review J.A.G., P. 9 and 10.)

Lt. Todd, as Provost Marshall, having convinced himself that the defendant was guilty and caused him to be committed to the guard house, made a report to his commanding officer concerning his findings. Of all the officers in the U. S. Army, only Lt. Todd was disqualified from being an

impartial investigator. Todd admitted he had a dispute with Smith a short time previously (R. 31). The impartial investigation was a matter of right, not a matter of convenience. Lt. Todd really made his investigation first as Provost Marshall, then using the same documents, papers and witnesses, made his report as impartial investigator.

(*Digest of Opinions of the J.A.G.*, supra;
Winthrop's Military Law and Precedents, supra.)

Errors Made by the Reviewing Authorities.

Review of Staff Judge Advocate dated September 19, 1944. The first 3½ pages of this report are just a summary of the testimony of the two girl complainants. The reviewing authority did not miss any fact that would support the People's case. The testimony of 6 soldiers, including the sentry at the gate, was disposed of in 37 lines. "The record fully justifies the inference that she did not in fact consent" (R. 68). This statement is contrary to the evidence (Exhibit B. Pages 2, 3 and 4).

The record indicates that she did consent. She was not bruised or injured nor were her glasses knocked off.

The reviewing authorities attach great significance, as did Constable Felton and Lt. Todd, to the cut on the defendant's hand.

"There is also corroborative circumstances of the scab from an incised wound on the accused's left hand at the spot where Miriam Cullum testified she bit him" (R. 69).

The accused explained this scab as resulting from a cut with a cleaver, but the Constable who examined it stated

the scab was from an incised wound rather than an abrasion or a cut. The word "incised" was used by the Trial Judge Advocate and Constable Felton. There was never any mention of an abrasion. An incised wound is precisely the type of wound that would be caused by a cleaver. Webster's New International Dictionary defines "incised" as "to cut in or into with a sharp instrument, to carve, to engrave." That type of wound could not come from a bite with teeth. They also neglected the fact that she testified she bit his *right hand*, whereas the cut was on the *left hand*.

The defendant attempted to offer the scar of the wound in evidence at the Lewisburg hearing on the habeas corpus and the Trial Judge without examining the scar determined that it was not important and inadmissible. At the time of the hearing the scar could be seen as that of a straight line and a continuous cut.

"The fact the attacks took place at the same place" (R. 69) was incompetent evidence and no proof against the defendant. The only emphasized point and underlined word in the entire review is the statement wherein Partyka, who was treated lightly, (the inference being that he was intoxicated at the time) stated that the defendant said he was with a girl that evening.

> "* * * after he reached the station that he was deliberately attempting to establish an alibi. In this connection it is to be noted that the accused testified he spoke to 'all' the men in the mess hall that night and although his memory before 12 o'clock was exact he testified 'there was no reason to remember the time after 12'." (R. 70) Review of Staff J. A.

The defendant was charged with two crimes which occurred between 10:45 and 11:45. He prepared his case on

those grounds. He might not have been able to advise the Court as to where he was at any other given time but as to the time of the alleged crime he made a detailed examination and preparation for the purpose of preparing his alibi. If it were necessary for him to establish where he was on any other occasions he should have been given the opportunity to prepare his defense.

"The accused's conduct with respect to the cut on his hand two days later also suggests the purpose of establishing an alibi" (R. 70).

In that the reviewer is correct. An alibi if established is a complete and total defense. If he could prove he wasn't there and if he could further prove that the essence of the prosecution's case, to wit: the lacerated hand, did not come from the bite of Miriam Cullum, he should have been acquitted. However, the reviewer construes this undisputed testimony of Sgt. Pelletier and the defendant as being false merely because it conflicts with a desire to find the defendant guilty. The Sergeant testified he saw fresh blood running from the defendant's hand and dressed the wound. No proof could be much more effective if it were true. Pelletier's credibility was not attacked.

The Review of the Branch Office of the Judge Advocate General dated December 9, 1944.

"Tall weeds had been broken down as if some person had been lying there". (R. 51).

There is no evidence in the case anywhere connecting up this evidence. This evidence was not binding on the defendant. Neither girl points out this spot to Constable Felton according to the testimony in the case. It was not evidence and utterly irrelevant, immaterial and highly prejudicial.

"The time element in the two crimes complement each other and are in harmony:"

This is no evidence against the defendant. This is one of the fundamental errors of the case. All prosecuting authorities construed both cases together, whereas each case had to rest on its own foundation. Perhaps the same man did commit both offenses. The defendant contends it was not he.

"The description given by Miriam of her assailant closely corresponds with the description given by Sheila" (R. 52).

These descriptions are of no value. Miriam Cullum identified the defendant as wearing an American uniform, riding a khaki colored bicycle and as the man who sat in the court room. The fact he was an American, wearing no stripes and riding a khaki colored bicycle could be any enlisted man in the army.

The J. A. G. Review stated: "Miriam bit her assailant on one of his hands" (R. 53). Miriam's statement said "right hand" (R. 259). The wound was, in fact, on the left hand (R. 193, 199-211). R. 176, referred to by the reviewer, was where they cross-examined Miriam as to the contradiction between her statement which said "right hand" and the fact, which was the left hand.

The J. A. G. erred in not appreciating the significance of Miriam's error. She bit a man on the right hand and because a man had a wound on his left hand he was convicted.

"The evidence is substantial and convincing that the same white American soldier committed the two crimes" (R. 51).

The reviewing authorities have arrived at the above presumption by circumstantial evidence, they then erroneously concluded the fact that if the defendant was the assailant he committed both crimes. This was error. (*U. S. v. Ross*, 92 U. S. 281, 283.) Therefore, as a matter of law, the Judge Advocate General's Office made a reversible error in the Review.

The Identification Parade Was Improperly Conducted.

Smith testified the C.I.D. man asked him if he wanted to change his position in line.

> "Before he had completed talking to me the other girl was brought out" (R. 216).

The second girl was brought out while the C.I.D. man was actually talking to Smith (R. 216). Smith testified Miriam Cullum was practically forced to go down to look at the men and she had her head half covered up. He said Sheila Dale walked down the line and had hysterics or something and one of the officers or C.I.D. men walked over to Smith and then Sheila Dale put her hand on him. He was not asked to show his teeth and Smith's hands were behind his back (R. 216). Constable Felton corroborates Smith as follows:

> "Q. What, if anything, did you see the person known as Sheila Dale do at the time the identity parade was held?
>
> A. I walked with her along the road and she picked out the man who assaulted * * *" (R. 194).

There is no contradiction of Smith's testimony in the record. Smith filed an affidavit with the District Court wherein he stated that the Dale and Cullum girls were kept in

Todd's office prior to the lineup and that they could see the scene of the lineup through a window. Constable Felton answered this accusation as follows:

"Q. Do you know whether or not from the office of Lt. Todd anyone could see the soldiers lined up in the parade?

A. No, sir, they could not.

Q. How do you know?

A. You can't see out the windows, *not at the bottom*" (R. 195).

The windows were hung in such a manner that they hinged from the bottom and Smith claimed in his affidavit that the girls could see the lineup over the top of the window.

The integrity and fairness of the lineup in view of Smith's accusations and the government's failure to refute or even deny the same is open to question. The defendant's affidavit contends that Constable Felton was alone with the two girls in Todd's office prior to the lineup, the inference being that Felton described the defendant to the girls.

POINT XIII.

The provisions of the Manual of Courts-Martial were violated to the prejudice of the defendant.

The defendant was ordered by his commanding officer, Capt. MacGregor, to report to him. The defendant inquired of Capt. MacGregor, the purpose of the summons and MacGregor replied: "Lt. Todd wants to see you. I don't know what he wants." Thereupon MacGregor es-

sorted Smith to Todd's office. At Todd's office he was quizzed for three hours by Felton and Lt. Todd in Capt. MacGregor's presence. At one time during the quiz, the defendant refused to answer and the defendant turned to Capt. MacGregor and said "Captain, am I required to answer these questions?" The Captain nodded to Lt. Todd and indicated that the defendant should do as directed by Lt. Todd. Todd then told him to answer the questions as propounded by Felton or go to jail. "Command of a superior officer is presumed to be a lawful command." (Sec. 134-b, 64th A. W.) The punishment for wilfully disobeying of a superior officer is: "1. Suffer death or such other punishment as a court martial may direct." (Article 64.) The defendant was not in a position to argue with his superiors.

Capt. MacGregor swore to the charges on information and belief (R. 117). He stated he had investigated the charges, but as a matter of fact the charges had been investigated by Lt. Todd and adopted by Capt. MacGregor.

> "An accuser or a prosecutor could not be a member of a court martial" (A. W. 8).

By the same reasoning an investigator of the charges can not be the impartial investigator pursuant to Sec. 35, M.C.M., wherein he is directed to investigate the "truth of the matters set forth in the charges, form of charges and what disposition of the case should be made in the interest of justice and discipline."

POINT XIV.

The application for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL F. MATHEWS,
Attorney and Counselor at Law,
915-919 University Block,
Syracuse, N. Y.